IN THE

Supreme Court of the United States

October Term, 1976

No. 76-791

PHIL JACOBS; JOSEPH LENTOWSKI;
DAVID SANDY and ROBERT GONZALES,

Petitioners,

v.

KEN KUNES, Maricopa County Assessor,
and the COUNTY OF MARICOPA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK I. HARRISON
and
ELY & BETTINI
111 West Monroe
Suite 1200
Phoenix, Arizona 85003
Attorneys for Petitioners

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding August 20, 1976.

OPINION BELOW

The opinion of the Court of Appeals, *Jacobs v. Kunes*, 541 F.2d 222 (9th Cir. 1976), appears in the Appendix hereto. The opinion of the District Court for the District of Arizona, not reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered August 20, 1976. A timely petition for rehearing was denied on September 22, 1976, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Are civilian governmental employees of the state entitled to any pretermination due process as guaranteed by the Fourteenth Amendment and can the determination of these standards be delegated to the states?

2. Do governmental employers have a right to impose arbitrary grooming regulations, promulgated without any demonstration of justification, on their employers who are nonmilitary, nonuniformed, adult employees?

CONSTITUTIONAL PROVISIONS AND STATUTES

1. United States Constitution Amendment 1: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. United States Constitution Amendment 9: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

3. United States Constitution Amendment 14, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of live, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. United States Code, Title 42, Section 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subject or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

On Thursday, June 26, 1975, the Petitioners were employees of the County of Maricopa, working for Ken R. Kunes, the county assessor. On said date the employees were given a memorandum to the effect that male employees were to cut their hair above the collar by June 30, 1975 (T.R. p. 20, lines 17-22).

Within four days the Employee Petitioners were not permitted to continue their employment for the reason that they were in violation of the aforementioned memorandum, despite the fact that the Respondent Ken R. Kunes had not seen any of them during these four days. (T.R. p. 29, lines 20-25).

These employees were subsequently suspended without pay and dismissed from their jobs, (T.R. p. 5, lines 14-20) despite the fact that fellow employees both with the County

Assessor's Office and other offices in Maricopa County whose hair length was in violation of said regulation remained on the job. Two of the Petitioners had no dealings with the public. (T.R. p. 8, 53, 56, 58). As a result of the actions taken by the Respondent, Ken R. Kunes, all four Petitioners were dismissed from their employment and have been without means of support and have been denied any reasonable recourse.

Before the Petitioner Employees were suspended there was no notice, discussion or hearing conducted of any type. (T.R. p. 5, lines 22-35, p. 6, lines 1-2). There were no complaints from fellow employees or from the public concerning these four employees. (T.R. p. 7, 39). At no time before legal proceedings were commenced, nor during the hearing thereof, was any justification given for the overnight institution of the said regulation and the drastic penalties for violation thereof.

The Petitioners brought a civil action seeking injunctive and declaratory damages and equitable relief to protect their rights secured by the Constitution of the United States and specifically, the First, Ninth and Fourteenth Amendments to the Constitution of the United States.

This action was brought pursuant to Title 28, USC § 1983, and United States Constitutional Amendments 1, 9 and 14, and supporting affidavits of the Petitioner Employees. Respondents filed a Motion to Dismiss which was heard by the United States District Court in Arizona on August 7, 1975. On August 20, 1975 the United States District Court of Arizona ordered the complaint and action dismissed with prejudice. On September 15, 1975, at a rehearing, the United States District Court of Arizona upheld its prior ruling of

dismissal with prejudice.

On August 20, 1976, the United States Court of Appeals for the Ninth Circuit held that the Petitioners were not required to exhaust their state remedies before proceeding in federal court under a 1983 action. The Court of Appeals, however, found there was no First, Ninth or Fourteenth Amendment protections to be given employees who wish to wear their hair long. In addition, the Court of Appeals held that as long as back pay could be awarded, then the procedural due process requirement would be satisfied even though no hearing or other protection was afforded the permanent employees before they were terminated. Finally, the Court of Appeals concluded that the temporary employees had no due process rights whatsoever.

REASONS FOR GRANTING THE WRIT

1. THE EFFECT OF THE COURT OF APPEALS DECISION IS TO DELEGATE TO THE STATES THE DETERMINATION AS TO WHETHER DUE PROCESS AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT HAS BEEN SATISFIED.

The effect of the Court of Appeals' decision is to delegate to the State of Arizona under its Merit System the determination as to whether due process as guaranteed under the Fourteenth Amendment has been satisfied. This is a radical notion misinterpreting decisions of the United States Supreme Court, specifically *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); and *Bishop v. Wood*, 48 L. Ed. 2d 684 (1976). And if allowed to stand the Court of Appeals' decision

would set a precedent mandating the resolution of the Federal Constitution and due process questions thereunder to the states. The Supreme Court respectfully must make clear that the Fourteenth Amendment is a provision of the Federal Constitution to be interpreted according to national standards and forestall the danger of courts adopting standards in variance with this precedent established since the inception of decision making by the United States Supreme Court. The effect of permitting the lower court's decision to stand in the instant case is to deny Petitioners' any due process rights prior to termination of their employment.

The significance of the Court of Appeals' decision cannot be overemphasized. All government workers will be affected and the Court of Appeals has virtually stripped them of any protection in their employment. The unbridled power to deprive government workers of their livelihood without any recourse prior to termination is a clear reversal of a very definite trend both in state and federal jurisdictions to afford protection to persons in their most prized possession—employment. Historically, employees have been given more safeguards such as the passage of child labor laws, Occupational Safety and Health Act regulations, protection against discriminatory employment practices and minimum wage guarantees.

Yet despite this trend, the Court of Appeals' decision will now permit governmental employers to arbitrarily dismiss a worker without demonstrating any validity whatsoever to the alleged charge, whether the issue be length of hair, race, religious preference, et cetera. The nightmarish vision of governmental employees given no notice, no hearing, no charges, no warning, simply a dismissal from their employment if they do not comply with any regulation established by their employer, no matter how whimsical in nature, will be

a reality if the Supreme Court permits this decision to stand. Retroactive protection is no protection at all.

Petitioners contend that governmental employment is a property right that they cannot be deprived of without due process of law. The arbitrary distinction between temporary and permanent employees is a distinction that could destroy constitutional rights. Further, to allow the state to make these arbitrary distinctions through their merit system allows the states to determine which of its citizens are entitled to federal constitutional protection. The employer could simply avoid a property interest from attaching by merely labeling all employees with less than five or ten or fifteen years service as temporary employees. Since there would be no property interest, there would be no right to due process. Our laws have always protected the sanctity of property. For twentieth century man, employment is his real property. Clearly, such an important valuable entity cannot be subject to the whimsical definitions and labels placed upon governmental employees by the different states, counties, cities and towns.

Petitioners further contend, at a minimum, some rudimentary due process rights must be afforded pretermination wherein the employee has an opportunity to be heard by an independent intervening authority and to answer the charges.

In the case of *Eley v. Morris*, 390 F. Supp. 913 (1975) a thorough analysis of *Arnett v. Kennedy*, 416 U.S. 134 (1974) states:

> "Under *Arnett v. Kennedy*, adequate pretermination procedures need not include a full evidenciary hearing, provided an employee is protected by a timely and effective post-discharge hearing procedure. The other minimal protections which should be afforded in these circumstances are unclear, but standards identical to those

upheld in *Arnett* would be constitutionally permissible. *As a minimum, pretermination procedures should include enough delay between receipt of initial discharge notice and the discharge date to allow the discharged employee to obtain a statement of the charges and to refute those charges, in writing and supported by affidavits before a reasonable state official.*" At p. 924 (emphasis added).

The Federal Court found that because the Georgia State Merit System provided no minimum protections, but rather a summary dismissal such as found in the Maricopa County Merit System, that this was in violation of procedural due process. The fact that a full hearing could be had after dismissal was not held to be sufficient. Some type of opportunity to informally answer the charges should have been given the government employees.

The Court of Appeals in its decision has said that due process attaches whenever the merit system says it does. However, the very concept of due process of law does not permit such a fragmentation of its interpretation.

2. THE EFFECT OF THE DISTRICT COURT AND THE COURT OF APPEALS DECISIONS IS TO GRANT UNBRIDLED AUTHORITY TO GOVERNMENTAL CIVILIAN EMPLOYERS TO DETERMINE GROOMING STANDARDS AND HIGHLY PERSONAL MATTERS OF INDIVIDUAL APPEARANCE WITHOUT ANY CORRELATION OR PROOF OF ANY KIND WHATSOEVER AS TO A NEED FOR SUCH STANDARDS OVER THE GOVERNMENTAL CIVILIAN EMPLOYEE.

The Supreme Court has never found it appropriate to allow the regulation of a government employee's hair length unless such an adult was involved with a military organization, a

police force or a fire fighting unit in which discipline and safety are intricately involved. The Petitioners in the case at bar cannot be shown to have come under any of the above categories and should thus be allowed to exercise their First, Ninth and Fourteenth Amendment due process and equal protection rights to be free from government interference with matters that affect the very sanctity and privacy of the human body.

The Court of Appeals has mistakenly relied upon *Kelly v. Johnson*, 425 U.S. 238 (1976). However, the Supreme Court clearly stated in *Kelly, supra*, at page 244 that the citizenry at large *does* have a constitutionally protected right to wear its hair any way it wishes because of the Fourteenth Amendment which grants a "liberty" interest in matters of personal appearance.

Petitioners contend that the unnecessary, arbitrary, and unwarranted regulation imposed by the Respondents is clearly unconstitutional on its face. However, the manner in which it has been imposed is a further and very serious violation of Petitioner's rights.

Petitioners were told to have their hair cut above the shirt collar on a Friday and the following Monday they were discharged. Yet, another co-employee testified that he was told to cut it to below the collar line and further, he asked if he could keep it that way a few days, which was allowed. (T.R. p. 54). Mr. Kunes' chief deputy had hair that was in violation of the new regulation. (T.R. p. 8). An employee from another department within Maricopa County still working testified. The Court described him as an individual with a full beard with substantial growth and full hair, well down below the bottom of his collar. Such blatant, arbitrary and

discriminatory practices cannot be tolerated under the Fourteenth Amendment guarantee of substantive due process and equal protection. *Ramsey v. Hopkins*, 320 F. Supp. 477 (1970); *Brown v. Schlessinger*, 365 F. Supp. 1204 (1973); and *Reichenberg v. Nelson*, 310 F. Supp. 248 (1970).

Individual liberty is the cornerstone of our system of laws. Unless there has been the need for government encroachment we have not permitted the same. At what point do we say enough government harassment? This is not a dress code wherein a change of clothes at the end of the work day can rectify the requirements of employment. Hair is an integral part of an individual and personality. This issue goes to the very heart of what type of society we shall have. It is necessary that the Supreme Court address itself to this crucial and compelling issue of unjustified governmental intrusion upon the private lives of its citizens and the instant case provides such a vehicle.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

MARK I. HARRISON
and
ELY & BETTINI
111 W. Monroe
Suite 1200
Phoenix, Arizona 85003
Attorneys for Petitioners

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PHIL JACOBS, JOSEPH LENTOWSKI, DAVID SANDY, and ROBERT GONZALES, Plaintiffs, vs. KEN R. KUNES, Maricopa County Assessor, and the COUNTY OF MARICOPA, Defendants.	)	No. Civ. 75-446 Phx. WPC MEMORANDUM AND ORDER

Plaintiffs are probationary and non-porbationary employees of the Maricopa County Assessor's office. Defendant Ken Kunes is the elected County Assessor and as such is in charge of and in one sense the "employer" of all employees of that department.

On June 26, 1975, Mr. Kunes by written memorandum established as a grooming standard for all male employees that they must have "their hair cut above the shirt collar". Some employees promptly complied. The plaintiffs refused and were first suspended, then terminated for that reason. It is defendants' intention to uniformly apply that standard to all male employees unless prevented by order of this Court.

Plaintiffs assert jurisdiction pursuant to 28 U.S.C. §§ 1331(a) & 1343(3) and 42 U.S.C. § 1983, claiming that enforcement of this standard is state action in violation of a number of their constitutional rights. For this court to proceed, plaintiffs must establish that the standard constitutes a clear violation of some specific constitutional guarantee.

Most (but not all) of the hair cases in federal court have

arisen in the context of school regulations, but the constitutional implication would appear to be the same in employer cases. *Fagan v. Nat'l Cash Register*, 481 F.2d 1115 (D.C. Cir. 1973). The circuits are about evenly split on whether a standard for male hair grooming violates any constitutional right. *Fagan v. Nat'l Cash Register*, supra at 1118, nn. 5 and 6. As noted in *Fagan* at 1118:

> "The Fifth Circuit, en banc, 1972, 460 F.2d 609, not only reversed the District Court, but announced a per se rule directing the District Courts thereafter to dismiss, forthwith, for failure to state a valid claim, a complaint which 'merely alleges the constitutional invalidity of a high school hair and grooming regulation.' "

It appears to this Court that the Ninth Circuit is firmly with those circuits which hold that no constitutional issue is involved here. *King v. Saddleback Jr. College District*, 445 F.2d 932 (9th Cir. 1971); *Campbell, et al., v. Beaughler*, et al., ___ F.2d ___ (9th Cir. June 23, 1975, No. 74-1763), which indicates "serious doubt that hair length regulations pose any cognizable constitutional questions", and with apparent approval quotes the following from *Zeller v. Donegal School District Board of Education*, ___ F.2d ___ (3rd Cir. May 14, 1975), plurality opinion:

> "[W]e determine today that the federal court system is ill-equipped to make value judgments on hair lengths in terms of the Constitution–whether an athletic code requiring that hair be 'neatly trimmed' would not pass muster, whether one putting the limit on hair twelve inches below the collar would pass, or whether one drawing the line at four inches below the collar would be more difficult of solution. A very real concern is that the decisional process not become, in the phrase of

> Justice Hopkins, 'amorphous and growing out of a shifting foundation laid on morals or community welfare' so as to invite 'indiscriminate use by the courts in the name of either expediency or a private view of morality–both of which take on color and shade from the eye of the beholder.' "

* * *

> "Having made a policy determination, it is important to underscore why we have drawn the line we have. In full recognition of the duty of federal courts to be hospitable to claims for redress of constitutional infringements, we have ruled deliberately. We have acted because of a felt concern that the sturdy tree of the federal judiciary is in need of pruning if it is to remain strong and stand tall, protecting basic individual liberties against unconstitutional impingements. We are concerned that, if the trimming process does not begin somewhere, the tree may topple of its own weight; that the proliferation of claims with exotic concepts of real or imagined constitutional deprivations may very well dilute protections now assured basic rights. We have a genuine fear of 'trivialization' of the Constitution. If this should occur, some of the monumental accomplishments in defining fundamental human rights and liberties may be compromised, and the protections accorded those rights and liberties threatened."

The court in *Fagan, supra*, also notes the number of instances in which the Supreme Court has denied certiorari in hair cases, despite the conflict among the circuits, and concludes at page 1119: "We may fairly assume this much, it would appear, the Supreme Court sees no federal question in this area."

This Court agrees.

IT IS ORDERED;

Defendants' motion to dismiss the complaint is granted. The complaint and action are dismissed with prejudice and the Clerk will enter judgment accordingly.

DATED August 19, 1975

/s/ William D. Copple
United States District Judge

(Title of Action)

MEMORANDUM AND ORDER

Plaintiffs have filed herein a motion for rehearing, correctly noting two issues in this case which were not discussed or specifically ruled upon in this Court's prior decision, i.e.,

1. Whether plaintiffs were deprived of a property right (expectancy of continued employment) without due process of law;

2. Whether plaintiffs must exhaust available administrative remedies before coming to this court claiming such lack of due process deprivation.

The basis for such a property right in public employees was defined in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972), and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694 (1972). The limitations on asserting such rights were clarified in *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633 (1974), and its progeny.

The Maricopa County Merit System provides available due process procedural protection for both probationary and nonprobationary employees. See Rule 10 and Rule 11 of said Merit System's rules and regulations. These due process procedures must be exhausted before plaintiffs can complain here of a deprivation of a property right without due process of law. *Arnett v. Kennedy, supra.*

IT IS ORDERED: As amplified above, the prior ruling of this Court will stand.

DATED September 15, 1975.

/s/ William D. Copple
United States District Judge

(Title of Action)
(FILED: August 20, 1976)

OPINION

Appeal from the United States District
Court for the District of Arizona

Before: WRIGHT, CHOY and GOODWIN, Circuit Judges.

CHOY, Circuit Judge:

Defendant Kunes is the County Assessor of Maricopa County, Arizona. His office assesses property, collects some taxes, and handles motor vehicle licensing. The plaintiffs were employed in the Assessor's office.

Kunes, in response to customer comments, issued a memo requiring that male employees wear their hair cut above the collar. Three employees complied. When the plaintiffs did not, they were suspended and eventually fired.

Plaintiffs thereupon brought a Civil Rights Act, 42 U.S.C. §1983, action in federal district court under 28 U.S.C. §1343. They alleged violations of their first, ninth, and fourteenth (both equal protection and due process) amendment rights.

The district court dismissed the action on the merits,[1/] and for lack of exhaustion of administrative remedies.

Plaintiffs appeal. We affirm in part, reverse in part and remand in part.

Exhaustion

As the purpose of the administrative remedy provided by Ariz. Rev. Stat. §11-356 and Maricopa County Merit System Rule (Merit Rule) 11 is to remedy, rather than forestall, a

deprivation, plaintiffs were not required to exhaust it. *Whitner v. Davis*, 410 F.2d 24, 28-29 (9th Cir. 1969).

Substantive Constitutional Claims

Plaintiffs argue that the hair length requirements (hereinafter "regulation") impinged upon several substantive constitutional rights: first amendment freedom of expression; ninth amendment right to privacy; fourteenth amendment substantive due process; and fourteenth amendment equal protection.

With the exception of the equal protection claim, the substantive claims are disposed of by the Supreme Court's decision in *Kelley v. Johnson*, ___ U.S. ___, 44 U.S.L.W. 4469 (Apr. 6, 1976). In *Kelley* the Court upheld restrictions on hair length and facial hair for policemen.[2/]

The Court found that the State's police power extended to the protection of persons and property through a uniformed police force, and that the State had wide latitude in the execution of this function and was entitled to a presumption of validity of the choices it made.

The test used was "whether [the] determination that such regulations should be enacted is so irrational that it may be branded 'arbitrary' and therefore a deprivation of [a] 'liberty' interest in freedom to choose [a] hairstyle." Id. at ___, 44 U.S.L.W. at 4472. This test is drawn from *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). This type of test has generally been used in substantive areas where the Court felt it ought to defer to legislative choice.[3/] Its use in *Kelley* seems to indicate that the hair length of public employees is such an area.

The Assessor's office is carrying out tasks within the police

power. The office is entitled to latitude in performing its functions, and the regulation is entitled to a presumption of validity. Particularly given the customer comments to which it was a response, we cannot find the regulation so irrational as to be a deprivation of liberty.

The *Kelley* Court subsumed ninth amendment claims equivalent to those raised in this case in the substantive due process claim discussed above. It rejected a first amendment claim on its merits. Id. at ___, 44 U.S.L.W. at 4471. The first and ninth amendment claims in this case have no more merit than those in *Kelley* and are rejected as well.

Neither is there any merit in the equal protection claim. *Campbell v. Beaughler*, 519 F.2d 1307 (9th Cir. 1975), *cert. denied*, ___ U.S. ___, 44 U.S.L.W. 3416 (Jan. 20, 1976); *King v. Saddleback Jr. College Dist.*, 445 F.2d 932 (9th Cir.), *cert. denied*, 404 U.S. 979 (1971).[4/]

Due Process Claim

Plaintiffs also allege that they had a property interest in continued employment and that the procedures for termination of employment were not adequate under the due process clause.[5/]

It appears that public employees who can be dismissed from their positions only "for cause" have a property interest in continuing employment. *Bishop v. Wood*, ___ U.S. ___, 44 U.S.L.W. 4820, 4821 n. 8 (June 8, 1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974).

Two of the plaintiffs[6/] in this case were "temporary" employees, hired to fill positions to be in existence for only a limited period of time. Merit Rule 7.5. They are not given any guarantee that they will not be dismissed except for

cause. Therefore it does not appear that they have a property interest in their positions and we affirm the district court's dismissal as to them.

The other two plaintiffs[7/] were "permanent" employees, subject to dismissal only for cause.[8/] Merit Rule 10. They did have a property interest, and can challenge the procedures for termination.

At least three of the members of the Supreme Court – Chief Justice Burger, and Justices Stewart and Rehnquist – are of the opinion that the property interest created by public employment is limited to the procedures set out for terminating it and that due process requires only that those procedures be complied with. *Arnett v. Kennedy*, 416 U.S. 134 (1974) (Rehnquist, J.). The procedures set out by the Merit Rules were followed here. See Merit Rule 10.

Other justices take the position that the Constitution is an independent source of procedural requirements once a property interest has been granted. *Id.* at 167 (Powell, J., concurring, joined by Blackmun, J.); *Bishop v. Wood*, ___ U.S. at ___, 44 U.S.L.W. at 4826 (White, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.).

It appears that of the justices who look to the Constitution for procedural requirements, at least Justices Powell and Blackman would uphold the system of Maricopa County involved here if backpay can be awarded to employees found to have been wrongfully dismissed. Justice Powell's opinion in *Arnett, supra*, reasoned that due process required a full hearing at some time before the deprivation became final. As the property in which the employee ordinarily has an interest in his income, where, as under the Maricopa County system, an adequate hearing is not provided until after

payment of that income has been suspended, it must be possible to award backpay when the hearing is finally held to prevent the deprivation from being final without due process.2/

Merit Rule 11.16 provides that "[t]he Commission shall have the power to direct appropriate remedial action...." Whether such "appropriate remedial action" can include an award of backpay does not appear in the record before this court. There is, therefore, a material issue of fact to be resolved and the permanent employees' due process claim should not have been dismissed.

Conclusion

That portion of the judgment dismissing the action for lack of exhaustion is reversed.

The dismissal of the temporary employees' claims is affirmed.

The dismissal of the permanent employees' claims is reversed solely on the due process issue and is remanded for further proceedings on that issue.

No. 75-3146

Footnotes

1. [reference at page 1]

The motion to dismiss was made under Fed.R.Civ.P. 12(b)(6), or alternately for summary judgment under Fed.R.Civ.P. 56. The district judge did not indicate on which the dismissal was based. We will treat it as a summary judgment because the district judge had to look at at least the merit system rules in addition to the pleadings. It does not make any difference for the result.

2. [reference at page 2]

See also Quinn v. Muscare, ___ U.S. ___, 44 U.S.L.W. 4627 (May 4, 1976) (fireman hair length regulation).

3. [reference at page 3]

See generally Note, *Developments in the Law—Equal Protection*, 82 Harv.L.Rev. 1065 (1969); G. Gunther & N. Dowling, Cases & Materials on Constitutional Law 974-78 (8th ed. 1970).

4. [reference at page 3]

Other circuits have held otherwise. *See e.g.*, Massey v. Henry, 455 F.2d 779 (4th Cir. 1972); Landsdale v. Tyler Jr. College, 470 F.2d 649 (5th Cir. 1972).

5. [reference at page 4]

There must be a deprivation of life, liberty, or property for there to be a due process issue. Board of Regents v. Roth, 408 U.S. 564, 569-71 (1972).

6. [reference at page 4]

Apparently Jacobs and Gonzales.

7. [reference at page 4]

Apparently Lentowski and Sandy.

8. [reference at page 4]

"Cause" is defined in § 17 of the Resolution (Dec. 24, 1969) of the Maricopa County Board of Supervisors adopting the county merit system to include improper attitude, insubordination, and willfull disobedience. There is no claim that, if plaintiffs' conduct is not substantively protected, there was not cause.

9. [reference at page 5]

As it is only the view of two justices (albeit necessary to assure a

majority of the Court on the due process issue) the notion that the deprivation is not final so long as backpay can be awarded does not change our holding on exhaustion, *supra*.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BEER, KALYNA & SIMON
By: Olgerd W. Kalyna
216 Luhrs Building
Phoenix, Arizona 85003
Attorneys for Respondent

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion below is appended to the Petition for Writ of Certiorari. The opinion was delivered on August 20, 1976, and a motion for rehearing denied on September 14, 1976. It must be noted, however, that the Court of Appeals did not *finally* adjudicate *all* issues, but remanded to the District Court for further proceedings. The proceedings for which the case has been remanded have not yet taken place, nor has the Court of Appeals had an opportunity to review that aspect of the litigation.

JURISDICTION

Respondents do not take issue with the timeliness of the Petition for Writ of Certiorari. They question, however, whether the judgment below has achieved such a state of finality as to be ripe for review by this Court. See, *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 70 S.Ct. 252, 94 L.Ed. 562 (1950).

QUESTIONS PRESENTED

Respondents take strong issue with the questions as framed by the Petition. The questions suggested by Petitioners indicate a lack of understanding of the issues resolved by the Ninth Circuit Court of Appeals. By no stretch of the imagination does the opinion below delegate to the states any determination of standards of due process. More appropriately, the first question must be restated as follows:

1. "Does the Maricopa County Employee Merit System (established pursuant to Arizona Revised Statutes § 11-351, et seq. and implemented by its Rules)[1] satisfy the due process requirements for the termination of permanent employees?"

(It should again be emphasized that this issue has not been fully resolved and is still subject to a factual determination by the U.S. District Court, whether "appropriate remedial action" of Merit Rule 11.16 does, in fact, include back pay.)[2]

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[1] The appropriate Arizona Revised Statues, the Resolution establishing the Merit System and Rules 10 and 11 of that System, are appended to this brief for the convenience of the Court.

[2] Inferentially, Petitioners argue that the absence of a pre-termination hearing violates their rights, per se, regardless of a speedy administrative remedy for reinstatement and award of full pay.

Question No. 2 likewise misstates the issue decided below. Respondents never claimed, nor did the Court of Appeals hold, that "arbitrary" hair regulations may be imposed on public employees. On the contrary, the Court followed *Kelley v. Johnson*, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976), but determined from the record that the hair regulation was not "so irrational that it may be branded arbitrary." It is more appropriate, therefore, to crystalize the issue by likewise restating the second question:

2. "Did Petitioners demonstrate that there is no rational connection between the regulation and the orderly administration of the duties of the Assessor's Office of Maricopa County?"

STATEMENT OF THE CASE

This action was filed by Petitioners in the U.S. District Court for the District of Arizona, pursuant to Title 42 U.S.C. § 1983. The Complaint sought a preliminary injunction to reinstate Petitiones to their former jobs and, accordingly, an order to show cause was issued by the Court.

The Respondents countered by a motion to dismiss pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. This motion was initially directed to the proposition that length of hair was not a constitutionally protected right.

The motion was then expanded by the filing of a copy of the Merit System and its rules, as well as the deposition of the County Assessor, Ken R. Kunes. The District Court chose not to rule on the motion to dismiss prior to the hearing of evidence. On August 7, 1975, the Petitioners

presented their evidence in support of the application for temporary injunction. It was only after that hearing and the filing of additional memoranda that the District Judge entered its memorandum and order (Appendix to Petition 1a).

The factual predicate upon which summary disposition of the action took place consisted of the following:

A. The pleadings;

B. Deposition testimony;

C. Evidence adduced at the hearing at which a preliminary injunction was sought; and

D. The Maricopa County Merit System and its rules.

STATEMENT OF THE FACTS

The four petitioners were employed by the Maricopa County Assessor's Office pursuant to the Merit System promulgated in 1970. Ken R. Kunes, the County Assessor, is an elected official, and, as such, has authority and responsibility for the operation of the County Assessor's Office, including the supervision of its personnel. His office serves principally two functions: (a) assessment of real and personal property, and (b) the collection of lieu tax and licensing of motor vehicles. These functions are performed by two separate offices which operate as independent entities, albeit, under the supervision of one Assessor. The two offices employ in excess of 300 persons, approximately 25 of whom occupy supervisory positions. The enforcement of the dress code (or any other employee-related rules) is conducted through these supervisors, at Mr. Kunes' direction.

Employee discipline is stringently regulated by the Merit System itself. Grounds for reprimand, suspension, demotion or dismissal are detailed (Merit System § 17). While the system does not provide for a pre-termination hearing, it *does* require that the employee be given written notice of his dismissal and that such notice set forth the reasons for the dismissal in sufficient detail to indicate the reasons for discharge (Merit System § 17(e)). These procedures are then expanded upon in Rule 10 of the Merit Rules.

A demoted, suspended or discharged employee is afforded a very speedy, full and impartial post-termination hearing, which must be held within twenty days after the employee appeals. (Merit System § 18 and Rule 11 of the Merit Rules.)

The order which precipitated the litigation below was issued by the Auto License Department manager, on authority of Mr. Kunes. On Friday, June 26, 1975, a memorandum was circulated which stated:

> "All male employees will have their hair cut above the shirt collar by Monday morning."

This specific order was intended to supplement the uniform enforcement of a dress code in all departments of the Assessor's Office.

There were seven young men at the Auto License Department who were affected by that memorandum and three of those complied within the required time. The Petitioners did not. Initially (for the first week), they were simply not allowed to perform their duties, but were paid all their wages. They were then suspended without pay, pursuant to Merit Rule 10.7, for two successive two-week periods and were formally dismissed in accordance with Merit Rule 10.3. All procedural matters required by the Rules affecting suspen-

sion and dismissal were complied with. Petitioners were told and they very well knew why they were suspended and why they were dismissed.[3]

Contrary to the assertion made in the Petition, notice of suspension and dismissal was given and Mr. Kunes did justify his hair code. The reasons for the order included taxpayer's complaints, Mr. Kunes' own idea of decorum and, specifically, what he believe to be more efficient service to the public.[4]

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[3] Mr. Lentowski's testimony, which applies to all four, is illustrative:

> "Q. There were seven of you who were asked to trim their hair, isn't that right, on this occasion?
>
> A. Yes, it is.
>
> Q. And how many of those complied?
>
> A. Three.
>
> Q. And they are working now, is that correct?
>
> A. To the best of my knowledge, yes.
>
> Q. And you were told, were you not, when you were suspended, that all you had to do is cut your hair and you would be back on the job?
>
> A. That is correct.
>
> Q. You made a conscious decision that you were not going to comply with it and now you have been fired?
>
> A. That is correct.
>
> Q. And you are aware, of course, that you may have certain rights under the merit system?
>
> A. That is correct.
>
> Q. You have been advised as to that?
>
> A. Yes.
>
> Q. You have not resorted to that remedy?
>
> A. No, I haven't."

Petitioners suggest the presence of selective or discriminatory enforcement of the hair regulation. The record does not support this conclusion. To be sure, one or two employees were found with hair just below the collar. These included a brand new employee who had received permission to get his hair cut in a few days and those who were unintentionally overlooked. Indeed, the District Court concluded that:

> "It is defendants' intention to uniformly apply that (regulation) to all male employees."

Petitioners interject an unwarranted suggestion that Petitioners "have been without means of support and have been denied any reasonable recourse." This is simply not so.

As a general proposition, Petitioners' abilities to obtain other employment or means of support were never part of the consideration in deciding the central issues of the case.

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[4] See, e.g., the following answers given at the deposition and hearing by Mr. Kunes:

> "A. Generally, I wanted those employees to dress nicely, cleanly, and to be so we would have the proper decorum in the office that would contribute to the efficiency of the operation, which would not arouse resentment on the part of the public that came in and with the customers of that office."
>
> * * *
>
> "A. Well, I think basically the taxpayers who come in and use the office, a certain percantage of these taxpayers come in with a chip on their shoulder or resent long hair, resent unkempt hair, bad appearances and so forth, and they react much better when they are waited on by a person who is neatly dressed, neatly attired, clean and so forth."

No factual predicate in this regard was established. Whatever evidence there was indicated the contrary. For instance, Petitioner Jacobs attempted to justify his right to long hair because while he worked for the Assessor during the day, he was employed in a discotheque at night. There, his long hair was essential for customer relations![5]

Finally, at least the permanent employees had more than reasonable recourse to the appeal procedures under the Merit System. Had they chosen to appea. their initial suspension, they may well have obtained administrative relief long before the hearing and order to show cause in the District Court.

REASONS FOR DENYING THE WRIT

1. In the first instance, Petitioners have failed to present this Court with a final adjudication of all issues below. The Court of Appeals remanded for factual resolution the due process claim of the permanent employees. It is at least theoretically possible that the District Court may reinstate two of the Petitioners and render the matter moot as to them.

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5 "Q. In terms, incidentally, Mr. Jacobs, of other employment, you have other employment, do you not?

A. Yes, I do.

Q. What does that consist of?

A. I'm a disc jockey in a discotheque at night. I work for a cocktail lounge.

Q. Let me ask you a question. In terms of that kind of job, is it almost essential that you have at least your hair at a moderate length like it is now?

A. Yes, it is quite essential, because of the type of music we play and the type of customers that we deal with. It's essential to the owner's business.

Review by certiorari at this stage of the proceedings appears to run contrary to established guidelines of this Court. *Maryland v. Baltimore Radio Show, Inc., supra.* A more appropriate procedure appears to be that followed in *Kelley v. Johnson, supra,* where certiorari was granted only *after* the District Court ruled on remand and the Court of Appeals affirmed without opinion.

2. Secondly, the decision of the Court of Appeals on the question of due process[6] is fully in accord with *Arnett v. Kennedy,* 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed. 15 (1974), rehearing denied, 417 U.S. 977 (1974), and *Bishop v. Wood,* ___ U.S. ___, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). There is no departure from, nor misunderstanding of those or any other decisions.

In *Arnett v. Kennedy,* this Court has carefully weighed and considered all of the policy arguments inherent in the pre-termination versus post-termination hearing delemma. The Maricopa County Merit System fully complies with the requirements set out in *Arnett* and, in many instances goes far beyond the minimum standards set there.

Petitioners argue that a distinction in the right of continued employment between temporary and permanent employees is arbitrary. This proposition is so ludicrous as not to merit a serious reply. Orderly employment practices by public employers require that temporary or probationary status be maintained. There is no suggestion anywhere that the temporary employees involved here were not truly temporary. If, indeed, a subterfuge were to be resorted to at some future date by the Maricopa County Assessor, then appropriate action may be brought.

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6 Holding that a speedy post-termination hearing which provides for reinstatement and back pay is sufficient.

As a practical matter, the original thrust of the Petitioners' Complaint was what they perceived an absolute constitutional right to wear their hair at any length, not only as private citizens, but also as employees of the Assessor's Office. They were told to cut their hair. This, they refused to do. Whether or not they were given a hearing in regard to their compliance *vel non* with the dress code is most probably beside the point.

3. Finally, the Court of Appeals' opinion in no way misconstrues *Kelley v. Johnson, supra.* It reocgnizes that as long as Petitioners act as private citizens, they may have a constitutionally protected right to wear their hair any way they wish. Thus, any such state action directed to the citizenry at large would unquestionably be unconstitutional. However, once a citizen seeks employment (public or otherwise), he must accept some burdens of his job. Rules and regulations of public employers, including those pertaining to hair, are entitled to presumption of validity. It is only when public employees are able to demonstrate that a particular regulation lacks any rational basis that the courts may, and should, intervene. The case under consideration recognizes these principles, but finds that Petitioners failed to show lack of rationality in the hair regulations.

The regulation challenged here does not violate any right guaranteed Petitioners by the Fourteenth Amendment of the United States Constitution. The Federal Court System should, once and for all, rid itself of trivial litigation. By now the subject of long hair as a constitutional issue has been exhausted.[7] The arguments and di-

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[7] *Fagan v. National Cash Register Company,* 481 F.2d 1115 (C.A. D.C. 1973).

versified decisions have run their course and this Court has laid all judicial speculation to rest by *Kelley v. Johnson, supra.* There is no reason to disturb the opinion below.

CONCLUSION

This case is not procedurally ripe for review. No recognizable constitutional rights of Petitioners have been violated and the Maricopa County Merit System provides for appeal procedure which satisfied the due process clause of the Fourteenth Amendment. The decision of the Court of Appeals is not at variance with established law. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BEER, KALYNA & SIMON

By: Olgerd W. Kalyna

Attorneys for Respondents

APPENDIX

ARTICLE 10. COUNTY EMPLOYEE MERIT SYSTEM

Article 10, consisting of sections 11-351 to 11-356, inclusive, added by Laws 1969, Ch. 117, § 2.

§ 11-351. Definitions

In this article, unless the context otherwise requires:

1. "Board" means the board of supervisors.
2. "Clerk" means the clerk of the board of supervisors.
3. "Commission" means the county employee merit system commission.

§ 11-352. Adoption of limited county employee merit system by resolution

Any county may by resolution of the board adopt a limited county employee merit system for any and all county appointive officers and employees. Elected officers shall not be included in such merit system.

§ 11-353. County employee merit system commission; members; terms; vacancies

A. Upon the adoption of a county employee merit system the board of supervisors shall appoint a county employee merit system commission to assist in administering the system. The commission shall consist of five members, each of whom shall hold office for a term of four years and until his successor is appointed and qualified. Of the members first appointed, two shall serve for a two-year term, two for a three-year term and one shall serve a four-year term, and such members shall determine by lot the length of their terms. Appointment to fill a vacancy caused by other than expiration of term shall be for the unexpired portion of the term.

B. Members of the Commission shall be selected from among the qualified electors of the county. No more than three of such members shall be from the same political party.

§ 11-354. Powers and duties of the commission

The commission shall perform such duties and exercise such powers as are necessary to carry out the provisions of this article. Added Laws 1969, Ch. 117, § 2.

§ 11-355. Minimum qualifications for employment

The minimum qualifications or standards prescribed for any class of grade of employment shall not be less than those prescribed by law for the class or grade of county officers and employees. Added Laws 1969, Ch. 117, § 2.

§ 11-356. Dismissal, suspension or reduction in rank of employees; appeals; hearings

A. Any officer or employee in the classified civil service may be dismissed, suspended or reduced in rank or compensation by the appointing authority after appointment or promotion is complete only by written order, stating specifically the reasons for the action. The order shall be filed with the clerk of the board of supervisors and a copy thereof shall be furnished to the person to be dismissed, suspended or reduced.

B. The officer or employee may within ten days after presentation to him of the order, appeal from the order through the clerk of the commission. Upon the filing of the appeal, the clerk shall forthwith transmit the order and appeal to the commission for hearing.

C. Within twenty days from the filing of the appeal, the commission shall commence the hearing and either affirm, modify or revoke the order. The appellant may

appear personally, produce evidence, have counsel and, if requested by the appellant, a public hearing.

D. The findings and decision of the commission shall be final, and shall be subject to administrative review as provided in title 12, chapter 7, article 6.[1] Added Laws 1969, Ch. 117, § 2.

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[1] Section 12-901 et seq.

RESOLUTION

(Adopted December 24, 1969 by the Maricopa County Board of Supervisors under the provisions of the Arizona Revised Statutes 11-351 through 11-356 establishing the MARICOPA COUNTY EMPLOYEE MERIT SYSTEM effective January 1, 1970. Included are amendments adopted July 6, 1970.)

* * * * *

Section 1. Title

This resolution shall be known and may be cited as the Maricopa County Employee Merit System.

Section 2. Administration

This merit system shall be so construed and administered as to provide a uniform, and equitable system of personnel administration of employees in the classified service. Recruitment, selection, appointment, development, promotion, transfer, layoff, classification, compensation, separation, discipline, dismissal, appeal hearing and provision for the welfare and rights of county employees shall be performed in a manner to secure and retain well-qualified employees to carry out county programs effectively and efficiently and to provide reasonable stability of employment in the county service.

Section 3. Merit Principles to be observed

The system of personnel administration for employees in the classified service shall be based upon merit principles. All appointments and promotions in the classified service shall be made according to merit and fitness as ascertained by examinations given in accordance with the provisions of this resolution.

Section 4. Definitions

The following words and terms shall have the meaning indicated below unless the context clearly indicates otherwise:

Appointing Authority: the single administrative or executive head of a county department.

Appointment: the offer and the acceptance of employment in the county service.

Board: the Maricopa County Board of Supervisors.

Commission: the Maricopa County Employee Merit System Commission.

County: the Maricopa County government.

Department: a County governmental unit under the control of an appointing authority which has a separate operating budget approved by the Board.

Director: the Maricopa County Personnel Director.

Eligible: a person who has attained a passing score on an examination for a specific class.

Employee: a person who is paid a wage, salary or stipend from public monies in accordance with official entries on a county payroll.

Permanent status: The status an employee achieves when he is retained in a position of the classified service after the successful completion of the initial probation period.

Position: a specific employment, whether occupied or vacant, involving duties requiring the services of one person.

Probation: a specified period of employment following appointment, reemployment, transfer, promotion or demotion; it is the final step in the examination process during which the work performance of an employee is evaluated.

Promotion: a change in the assignment of an employee from a position in one class to a position in another class having a higher range of pay.

Suspension: the temporary separation of an employee from his position for disciplinary reasons.

Section 5. County Service

A. The county service shall encompass all employment within Maricopa County government wherein persons are paid a wage, salary or stipend from public monies in accordance with official entries on a county paryoll. The county service shall not include persons who perform services for which payment is made on a fee, contract or claim basis.

B. Notwithstanding any other provisions of the Maricopa County Employee Merit System, the provisions of this resolution shall not apply to:

(1) Patients or inmates of county institutions.
(2) Officers, teachers, employees or personnel of the various school systems.
(3) Members of boards, commissions and committees appointed by the board.
(4) Employees of the department of community services and enrollees in federal programs administered by the community services department.

Section 6. Unclassified Service

Within the county service there shall be the unclassified service which shall include:

A. Persons occupying the following authorized positions:

(1) All elected officials.
(2) In the department of Assessor, Attorney, Clerk of Superior Court, Recorder, School Superintendent, Sheriff and Treasurer:
  (a) One chief deputy who is designated either by statute or the elected official to act and perform duties of such elected official during his absence or incapacity.
  (b) One confidential secretary.
(3) Clerk of the Board of Supervisors.

(4) The single administrative or executive head of each county department.
(5) Positions filled through direct appointment by Superior Court Judges.
(6) Persons who are paid a stipend in lieu of wages to defray expenses during their period of training.
(7) Legal counsel appointed by the board to serve county departments, boards, commissions and committees.

B. Persons appointed to exempt positions which may be created in the future.

Section 7. Classified Service

The classified service shall include all positions except those identified herein as unclassified.

Section 8. Department of Personnel

A. There shall be in Maricopa County government a personnel department, the executive head of which shall be the personnel director. He shall be responsible to the commission for the accomplishment of all personnel functions assigned by the board to the commission. He shall be responsible to the board through the county manager for all other personnel functions in both the classified and the unclassified service.

B. In the personnel department there shall be a commission of five members appointed by the board with the powers and duties hereinafter enumerated. The commission shall have authority within the classified service concerning examination, eligibility, classification, appointment, grievances and related matters as established in the Merit System Rules; it shall also advise the director, county manager and board concerning pay, benefits and other personnel matters for both the classified and unclassified service.

Section 9. Merit System Commission

A. Members of the commission shall be selected from among the qualified electors of the county and shall be in sympathy with the application of merit principles to public employment. No more than three of such members shall be from the same political party. No member of the commission shall be a member of any local, state, or national committee of a political party or an officer or member of a committee in any partisan political club or organization, or shall hold, or be a candidate for any elective office except as defined in Section 20 of this resolution.

B. Each member shall hold office for a term of four years and until his successor is appointed and qualified. Of the members first appointed, two shall serve for a two-year term, two for a three-year term and one shall serve a four-year term, and such members shall determine by lot the length of their terms. Appointment to fill a vacancy caused by other than expiration of term shall be for the unexpired portion of the term.

C. A member of the commission may be removed by the board for cause. Any one of the following shall constitute the resignation of a commissioner and authorize the board to appoint a new member to fill the unexpired term so vacated:

(1) Absence from three consecutive quarterly meetings.
(2) Becoming a candidate for any elective public office except as defined in Section 20 of this resolution.
(3) Accepting any appointive office or employment in the county service.

D. The commission shall elect one of its members chairman. It shall meet at such times and places as shall be specified by call of a majority of the commission or of the chairman. At least one meeting shall be held in each quarter. All meetings shall be open to the public. At least five days' written notice of each meeting shall be given by the director to each member not joining in the call. Three members shall constitute a quorum for the transaction of business.

Section 10. Powers and Duties of the Commission

The commission shall perform such duties and exercise such powers as are necessary to carry out the provisions of this resolution. In addition to the duties imposed upon it elsewhere, it shall be the duty of the commission:

A. To prepare such rules as it may find necessary or appropriate for the administration of the personnel system pursuant to the provision of Section 12 herein.

B. To represent the public interest in the improvement of personnel administration in the county service.

C. To advise the board, county manager and director of problems concerning personnel administration.

D. To advise and assist in fostering the interest of institutions of learning, civic, professional and employee organizations in the improvement of personnel standards in the county service.

E. To review any personnel action which it may consider desirable concerning the administration of personnel in the county service and to make recommendations to the board.

F. To make annual reports and such special reports as it considers desirable to the board regarding personnel administration in the county service and recommendations for improvements.

Section 11. Appointment and Duties of the Director

A. The director shall be a person who has had experience in the field of public personnel administration and is

in sympathy with the application of merit principles and scientific methods to public employment.

B. When a vacancy exists for the director, the merit system commission shall appoint a special examining committee of three persons to conduct an examination for the position of director. The members of such committee shall be persons who have knowledge of and are in sympathy with the principles of the merit system in public personnel administration. The commission shall certify to the board the names of the three highest eligibles and the board shall appoint one of the designated eligibles as personnel director. The special examining committee shall have the same powers and duties with respect to conducting the examination and establishing the employment list that are vested in or imposed upon the director with respect to other positions in the classified service.

C. The director, as executive head of the personnel department, shall direct and supervise all of its administrative and technical activities. In addition to the duties imposed upon him elsewhere, it shall be the duty of the director:

(1) To attend meetings of the commission and to act as its secretary and keep minutes of its proceedings.
(2) To establish and maintain a roster of all employees in the county service, in which there shall be set forth, as to each employee, the class title, pay or status and other pertinent data.
(3) To appoint such employees of the personnel department and such special assistants as may be necessary to carry out effectively the provisions of this resolution.
(4) To develop, in cooperation with appointing authorities and others, programs for the improvement of

employee effectiveness including training, health, counseling and welfare.
(5) To review from time to time the operation and effect of this resolution and of the rules and to report his findings and recommendations to the commission, the county manager and the board.
(6) To perform any other lawful act which he may consider necessary or desirable to carry out the purposes and provisions of this resolution.

Section 12. Merit System Rules

A. The director shall prepare and submit to the commission proposed rules for the classified service. He shall give reasonable notice to the heads of all departments or agencies affected and they shall be given an opportunity, upon request, to appear before the commission to express their views thereon.

B. Rules or amendments which are approved by the commission shall be submitted through the county manager to the board. If not approved or rejected by the board within 60 days after submission, then the rules or amendments shall automatically become effective. The rules shall provide:

(1) For the preparation, maintenance and revision of a position classification plan for all positions in the classified service, based upon the similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required and the same schedule of pay may be equitably applied to all positions in the same class. Each position authorized by the board shall be allocated by the director to the proper class and assigned to the appropriate pay range for that class.
(2) For open competitive examinations to determine the relative fitness of applicants for the respective

competitive positions.

(3) For promotion which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and conduct. Vacancies shall be filled by promotion whenever practicable and in the best interest of the county service.

(4) For the establishment of eligible lists for appointment and promotion, upon which lists shall be placed the names of successful candidates in order of their relative excellence in the respective examinations. The duration of eligible lists for initial appointment and promotion shall be for no more than one year unless extended by the director for not more than one additional year; in certifying eligibles to appointing authorities, the director shall not certify more than the top five names from the eligible list for a single vacancy.

(5) For the rejection of candidates who failed to comply with reasonable requirements in regard to such factors as age, physical condition, training and experience or who have been convicted of a felony or who have attempted any deception or fraud in connection with an examination.

(6) For periods of probationary employment. During the initial probation period following appointment any employee may be discharged or demoted without charges or hearing except that any applicant or employee, regardless of status, who has a reason to believe that he has been discriminated against because of religious or political opinions or affiliations or race or national origin in any personnel action may appeal to the commission in accordance with the provisions of Section 18.

(7) For provisional employment without competitive

examinations when there is no appropriate eligible list available.

(8) For transfer from a position in one department to a position in another department involving similar qualifications, duties, responsibilities and salary.

(9) For reinstatement within one year of persons who resign in good standing.

(10) For keeping records of performance of all employees in the classified service.

(11) For layoffs only for lack of funds, lack of work or abolishment of positions; and for reemployment or transfer of employees so laid off, giving consideration to performance record and seniority.

(12) For the suspension of employees with or without pay as a disciplinary measure.

(13) For discharge or demotion of a permanent status employee only for cause.

(14) For competitive selection of employees for all classes in the classified service.

(15) For establishment of a plan for resolving employee grievances and complaints.

(16) For such other rules, not inconsistent with this resolution, as may be proper and necessary for its enforcement.

Section 13. Status of Present Employees

County employees holding positions in the classified service who have satisfactorily completed their probationary period prior to the effective date of this resolution shall be continued in their positions as permanent status employees. All other county employees in the classified service are probationary employees and will attain permanent status upon successful completion of a probationary period computed from date of employment.

Section 14. Character of Examinations

A. The entrance and promotion tests shall be of such character as to determine the qualifications, fitness and ability of the persons tested to perform the duties of the class of positions for which a list is to be established.

B. The tests may be written, oral, physical, or in the form of a demonstration of skill or any combination of such types.

C. Written and oral examinations of applicants possessing required graduate degrees, licenses, registration, board certification, or similar requirements may be waived by the director but not evaluation for competitive selection purposes of education, experience, aptitude, capacity, knowledge, character, physical fitness and other qualifications as necessary for determination of relative fitness of the applicants and order of excellence.

D. Written and oral examinations of applicants for selection of unskilled, semiskilled and part-time employees for positions subject to conditions of employment that make it impracticable to supply the needs of the service by prescribed methods of appointments may be waived by the director provided he uses other procedures that assure the selection of employees on the basis of relative fitness of the applicants and order of excellence.

Section 15. Minimum Qualifications

The minimum qualifications or standards prescribed for any county employment shall not be less than those prescribed by law and changes to a class specification that increases educational requirements shall have no effect on the eligibility of incumbents of the class to progress in the series

of the class until a level of the series is reached that specifically requires a graduate degree, a specific license, registration, board certification, or similar accreditation by a recognized association or agency.

Section 16. Appointments to Unclassified Service: Return to Classified From Unclassified Service

A. An appointing authority, in his discretion, may request from the director a list of eligible candidates for a position exempt from the classified service and may appoint an employee from such a list.

B. Any employee in the classified service who has taken or takes a position in the unclassified service and who thereafter is ready to report for duty for a position in the classified service shall be placed on the eligible list for the appropriate class in which he has attained permanent status for future reemployment when vacancies in the class occur. The order in which names shall be placed on the eligible list for any class shall be by seniority in county service in accordance with the rules of the commission.

Section 17. Reprimand, Suspension, Demotion, Dismissal

A. An appointing authority, subject to A.R.S. Section 11-356 and any regulations issued by the commission, may reprimand an employee in the classified service under his jurisdiction or suspend such an employee without pay or with reduced pay for a period not exceeding thirty calendar days for any single cause.

B. An appointing authority, subject to A.R.S. Section 11-356 and any regulations issued by the commission, may demote an employee in the classified service under his jurisdiction from a position in any given class or grade to a position in a lower class or grade for which the employee possesses

necessary qualifications. The appointing authority shall give the director written notice of his intention to effect any such demotion before the date it is intended to become effective. The director may transfer such an employee whose record is otherwise satisfactory to a similar position or one for which he is qualified under the jurisdiction of another appointing authority with the approval of such other appointing authority.

C. An appointing authority may remove any employee with permanent status only for cause. Each of the following constitutes cause for discipline or dismissal of an employee in the county service:

(1) Fraud in securing appointment.
(2) Incompetency.
(3) Inefficiency.
(4) Improper attitude.
(5) Neglect of duty.
(6) Insubordination.
(7) Dishonesty.
(8) Drunkenness on duty.
(9) Addiction to the use of narcotics or habit-forming drugs.
(10) Absence without leave.
(11) Conviction of a felony or a misdemeanor involving moral turpitude.
(12) Discourteous treatment of the public.
(13) Improper political activity.
(14) Willful disobedience.
(15) Misuse of government property.

D. In addition to the causes prescribed herein, the merit system commission may establish other causes that are deemed necessary.

E. A permanent employee shall be given written notice of such dismissal and one copy of same shall be filed with

the director as ex officio clerk of the commission and one copy of same shall be filed with the clerk of the board. Such notice shall set forth the reasons for dismissal in sufficient detail to indicate whether the employee was discharged for misconduct, incompetency or other reasons relating to the effective performance of his duties and shall be prepared in such form and given in such manner as the director prescribes. The name of any such employee dismissed for incompetency or other reasons relating to the effective performance of his duties shall be immediately removed from the eligible list in the office of the director subject to reinstatement by the commission.

Section 18. Appeal by Employee

A. Any employee holding a permanent status in the classified service who is demoted, suspended, or dismissed, or is individually aggrieved as a result of alleged discrimination, unfair treatment, unsafe or unhealthy working conditions, or interpretation and application of county personnel regulations and who has complied with preliminary grievance procedures prescribed by regulations issued by the commission, may obtain a review of such action or alleged grievance by presenting a written appeal to the commission; any employee, regardless of status, who is individually aggrieved as a result of alleged discrimination because of religious or political opinions or affiliations or race or national origin in any personnel action may appeal to the commission after complying with the prescribed regulations governing grievance procedures. Any appeal concerning demotion, dismissal or suspension shall be filed with the director, as ex officio clerk of the commission, within ten days from the effective date of such action or within ten days of the completion of the final step of the preliminary grievance procedure; any appeal concerning any alleged discrimination or

unfair treatment or working conditions as described above shall be similarly filed within ten days of the completion of the final step of the preliminary grievance procedure.

B. A copy of such appeal shall be forwarded by the director to the appointing authority of the employee and to the commission. The commission shall thereupon assign a time and place for a hearing and shall give notice thereof to all parties concerned. Within 20 days from the filing of the appeal, the commission shall commence the hearing and either affirm, modify or revoke the order.

C. The appellant may appear personally, produce evidence, have legal counsel and, if requested by the appellant, a public hearing.

D. Both the employee and his appointing authority shall be notified reasonably in advance of the hearing. The commission, or a duly appointed hearing officer, shall conduct the hearing. The commission shall prepare an official record of the hearing, including all testimony recorded manually or by mechanical device, and exhibits; but it shall not be required to transcribe such record unless requested by the employee, who shall be furnished with a complete transcript upon payment of the actual cost.

E. The commission shall not be bound by technical rules of evidence prevailing in the courts. If, after hearing, a majority of the commission determines that the action appealed from was arbitrary or taken without reasonable cause, the appeal shall be sustained; otherwise, the appeal shall be dismissed. The commission shall have the power to direct appropriate remedial action and shall do so after taking into consideration just and equitable relief to the employee and the best interests and effectiveness of the county service.

F. Within ten days of a decision by the commission sustaining an appeal, the appointing authority of the employee shall take such measures as are necessary to comply with the remedial action directed by the commission and shall render a report of such measures to the director.

G. The findings and decisions of the commission shall be final and shall be subject only to administrative review as provided in Arizona Revised Statutes, Title 12, Chapter 7, Article 6.

H. An employee laid off or dismissed by reason of economy, lack of work, insufficient appropriations, change in departmental organization or abolition of position may file an appeal with the commission only on the grounds that the order of layoff or dismissal has not been determined in accordance with this resolution and the rules of the commission.

I. Matters involving examinations, compensation schedules and classes of positions shall not be appealable under this section.

J. The commission may request the board to issue subpoenas to compel attendance of any person and the production of any books or papers relating to any investigation or hearing authorized by this resolution in accordance with the powers of the board under A.R.S. Section 11-218.

Section 19. Nondiscrimination

No discrimination shall be exercised in any manner by any county official, appointing authority or employee against or in favor of any applicant, eligible or employee because of his political or religious opinions or affiliations, or because of race, sex, religious creed, color, national origin or ancestry by refusing to hire or employ him, or to bar him or to dis-

charge him from employment, or discriminate against him in compensation, or in termination conditions or privileges of employment, all as specified in A.R.S. Title 41, Chapter 9, Article 4. Sections 12 B(6) and 18 of this resolution provide the right of appeal by any applicant or any employee regardless of his status to the Maricopa County Personnel Commission in any case of alleged discrimination as defined herein or appeal whenever any alleged discrimination is handled by means of grievance procedures established by the rules and regulations implementing this resolution.

Section 20. Political Activity

A. No employee shall:

(1) Use any political endorsement in connection with any appointment to a position in the county classified service.

(2) Use or promise to use any official authority or influence for the purpose of influencing the vote or political action of any person or for any consideration.

B. No employee shall be a member of any national, state or local committee of a political party, or an officer or chairman of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take any part in the management or affairs of any political party or in any political campaign, except that any employee may express his opinions, attend meetings for the purpose of becoming informed concerning the candidate for public office and the political issues, cast his vote or serve as precinct committeeman.

C. The provisions of this section shall not apply to school board elections or junior college district governing board elections, and an employee or commissioner may serve

as a member of the board of trustees of a common or high school district or as a member of the junior college district governing board.

D. Any person in the county service who violates any of the provisions of this section shall be subject to suspension of not less than thirty days or dismissal.

E. This section does not deny any commissioner or employee of his civil or political liberties as guaranteed by the United States and Arizona constitutions.

Section 21. Nonconformity with Federal and State Standards

Whenever any provision of this merit system conflicts or is inconsistent with federal standards for personnel administration or state law authorizing a state agency to establish minimum standards for personnel or performance, the commission is authorized to vary the terms of its rules to the extent necessary to comply with conditions for federal and state grants.

Section 22. Compliance

All officials, appointing authorities and other county employees shall conform to, comply with, and aid in carrying into effect the provisions of this resolution and the rules adopted hereunder.

RULE 10 – SEPARATIONS AND DISCIPLINARY ACTIONS

10.1 General Provisions

Except as otherwise provided in these Rules, the tenure of an employee with permanent status shall continue during good behavior and the satisfactory performance of his duties.

10.2 Layoffs

(a) An appointing authority may lay off an employee in the County Service whenever it is necessary by reason of shortage of funds or work, or by reason of a bona fide abolishment of or change in the duties of a position, or when the agency is reorganized and the need for the position is eliminated.

(b) When a layoff is deemed necessary by the appointing authority, he will notify the Director, who will establish in consultation with the appointing authority the order of preference of layoff for as many employees as are to be separated. In any event, the Director will attempt to obtain a transfer of the employees to be laid off to other vacancies in the County Service.

(c) No employee with permanent status is to be separated by layoff while there are provisional, temporary, emergency, seasonal or probationary employees serving in the agency in the same, or equal or lower level positions for which such permanent status employee or employees are qualified and available for reassignment.

(d) In determining the order of layoff of employees with permanent status, the Director shall consider on a consistent and equitable basis such factors as qualifications, performance appraisals, work record, conduct, and seniority.

10.3 Dismissals

(a) The appointing authority may remove any employee with permanent status only for cause as provided in the Resolution or in Rule 15, but not before furnishing the Clerk of the Board, the employee and the Director personally or by registered mail with a written statement of the statutory or other grounds and the specific reasons for dismissal in sufficient detail to apprise the employee of the

facts. The appointing authority shall include in the written statement to the employee notice of the employee's right to appeal in writing to the Commission within ten calendar days from the date of notice of dismissal. This provision shall not, however, be construed as precluding the appointing authority from relieving an employee immediately from his official position or from excluding him from his post or place of duty or employment pending preparation and giving notice of dismissal, but no pay shall be withheld for such period.

(b) At any time before receiving the Commission's notice of the time and place of the hearing, the appointing authority may serve on the employee and file with the Commission an amended or supplemental notice or statement of dismissal. If the amended or supplemental notice states new causes, the Commission may grant the employee's request for a continuance of the hearing for a reasonable time to allow the employee to prepare his case.

(c) An employee with permanent status may appeal his dismissal as provided in these Rules. An employee, regardless of status, may appeal when Rule 2.11 is the alleged basis of the issue.

10.4 Separation or Dismissal During Probationary Period

An employee may be separated or dismissed without the right of appeal at any time during the probationary period, except as stated in Rule 2.11. A promotional probationary employee may be demoted from his promotional position without right of appeal when Rule 2.11 does not apply, but may not be separated from the County Service without the right of appeal. In any case of separation, dismissal, or demotion during an employee's probationary period, the Director or the Commission may investigate the circumstances and causes for the action taken,

and shall do so when the employee alleges discrimination as described in Rule 2.11.

10.5 Resignations

An employee who desires to terminate his service with the County shall submit a written resignation to the appointing authority at least ten calendar days prior to the effective date of the resignation.

10.6 Retirement

If an employee with permanent status is retired as provided under the State Retirement System (or the Public Safety Personnel Retirement System, if applicable) he is deemed to be separated without prejudice and does not have the right to appeal to the Commission.

10.7 Suspensions

(a) An appointing authority may as a disciplinary action suspend any employee for cause with or without pay. A permanent status employee may be suspended only by written order from the appointing authority stating specifically the reasons for the action and the duration of the suspension. The order must be delivered personally or sent by registered mail to the employee within three calendar days of the effective date of such suspension and a copy filed with the Clerk of the Board and the Director.

(b) Except as otherwise provided by Resolution or in these Rules, suspensions shall not exceed thirty CALENDAR days for any single cause of suspension.

(c) An employee with permanent status may appeal his suspension as set forth in the Resolution or these Rules; an employee, regardless of his status, may appeal suspension when he alleges discrimination as described in Rule 2.11.

RULE 11 – APPEALS

11.1 Matters Which May Not Be Appealed

The Commission will not accept appeals:

(a) From employees in the unclassified service.

(b) For matters involving compensation schedules or classes of positions.

(c) From probationary employees except for alleged discrimination.

11.2 Matters Which May Be Appealed

(a) An employee in the classified service who has attained permanent status may appeal:

(1) Within ten days of receipt of a written order from his appointing authority for dismissal, demotion or suspension.

(2) Within ten days after completion of the final step of the grievance procedure within his department if he is individually aggrieved as a result of unsafe or unhealthy working conditions, unfair treatment or incorrect application of personnel policies.

(b) Any employee in the classified service may appeal within ten days after completion of the final step of his departmental grievance procedure if the basis of his appeal is alleged discrimination.

11.3 Appeal

Every appeal to the Commission must be filed in writing through the Personnel Director. It shall state the facts upon which it is based and the action requested of the Commission. The appeal shall provide in sufficient detail the necessary facts and identity of all persons or agencies concerned in a manner that the Commission may understand the nature of the proceeding and appeal. Unless the appeal names

some other respondent, the appellant's appointing authority shall be considered the only respondent. The Director shall serve a copy of the appeal on the respondent.

11.4 Answer

No answer to the appeal need be filed by the respondent. If an answer is filed prior to the hearing, a copy thereof shall be sent by the Director or hearing officer to the appellant. If no answer is filed, every relevant and material allegation of the appeal is in issue, but in any case, irrelevant and immaterial issues may be excluded.

11.5 Hearing Officers

Any appeal may be assigned by the Commission or its chairman to a hearing officer for hearing. When an appeal is assigned to a hearing officer, he shall be the authorized representative of the Commission and is fully authorized and empowered to grant or refuse extensions of time, to set such proceedings for hearing, to conduct the hearing, and to take any action in connection with the proceedings which the Commission itself is authorized to take by law or by these Rules other than making the final findings of fact, conclusions of law, and order. No assignment of an appeal to a hearing officer shall preclude the Commission or its chairman from withdrawing such assignments and conducting the hearing itself or from reassigning an appeal to another hearing officer.

11.6 Time for Hearing

Every hearing on an appeal shall commence within twenty days from receipt by the Commission unless the time is extended by mutual consent of the appellant and respondent.

11.7 Notice of Hearing

Written notice of the time, date, place of hearing of an

appeal, and of the name of the hearing officer, if any, shall be served by the Director on the appellant and the respondent at least seven calendar days before the date of such hearing. This notice may be delivered personally or by registered mail.

11.8 Nature of Hearing

Each hearing shall be private unless the appellant requests a public hearing. Any party may be represented by himself or legal counsel of his choosing. The hearings shall be informal and technical rules of evidence shall not apply to the proceedings, except that irrelevant, immaterial, incompetent or unduly repetitious evidence or evidence protected by the rules of privilege recognized by law may be excluded. All testimony at the hearing shall be recorded manually or by mechanical device.

11.9 Exclusion of Witnesses

Upon the motion of any appellant or respondent, the hearing officer, in his discretion, may exclude from the hearing room any witnesses not at the time under examination; but a party to the proceedings, or his attorneys, or other persons conducting the case, shall not be excluded.

11.10 Witness Fees

Witnesses, other than employees, when subpoenaed to attend a hearing or investigation are entitled to the same fee as is allowed witnesses in civil cases in courts of record. If a witness is subpoenaed by the hearing officer on his own motion, fees and mileage may be paid from funds of the Commission upon presentation of a duly executed claim. If a witness is subpoenaed upon request of the appellant or respondent, the fees and mileage shall be paid by the party requesting the witness. Reimbursement to employees sub-

poenaed as witnesses shall be limited to payment of mileage by the party requesting him.

11.11 Depositions

If a witness does not reside within the County or within one hundred miles of the place where the hearing or investigation is to be held, is out of the State, or is too infirm to attend the hearing or investigation, any party thereto at his own expense may cause his deposition to be taken. If the presence of a witness cannot be procured at the time of hearing or investigation, his deposition may be used in evidence by either party or the Commission.

11.12 Proposed Findings of Fact

Both appellant and respondent shall have the right to file with the Commission or its hearing officer, if any, on or before the date of the hearing, proposed findings of fact. In the event such proposed findings of fact are filed by either or both parties, the written findings of fact of the hearing officer and the Commission shall include a ruling upon each such finding proposed by the appellant and the respondent.

11.13 Findings of Fact; Conclusions of Law; And Order

The Commission shall make written findings of fact, conclusions of law and an order within twenty days from the conclusion of the hearing and a copy thereof shall be sent by registered mail to the appellant and the respondent at the addresses given at the hearing or to a representative designated to receive same. In the event the Commission orders the respondent to reinstate the appellant, it may also order the respondent to reinstate the appellant with or without back pay for such period and in such amounts as the Commission deems proper under the circumstances;

further, the respondent shall take remedial action within ten days of the Commission order.

11.14 Duties of the Hearing Officer

In all cases assigned to hearing officer for hearing, he shall prepare proposed findings of fact and conclusions of law in such form that they may be adopted as the Commission's findings and conclusions in the case, except as otherwise directed by the Commission. A copy of the proposed findings and conclusions shall be filed by the hearing officer with the Commission within ten days from the last date of the hearing. The hearing officer may be present during the consideration of the case by the Commission, and, if requested, shall assist and advise the Commission. Upon filing of the proposed findings and conclusions, the Commission may adopt them in their entirety, and modify them, or may itself decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same or another hearing officer to take additional evidence.

11.15 Withdrawal of an Appeal

The appellant may submit a written request to withdraw his appeal at any time prior to the decision by the Commission.

11.16 Decision by Commission

If, after hearing, a majority of the Commission determines that the action appealed from was arbitrary or taken without reasonable cause, the appeal shall be sustained, otherwise, the appeal shall be dismissed. The Commission shall have the power to direct appropriate remedial action and shall do so after taking into consideration just and equitable relief to the employee in the best interest of the County and the public.

11.17 Compliance of Appointing Authority

Within ten days of a decision by the Commission sustaining an appeal, the appointing authority of the employee shall take such measures as are necessary to comply with the remedial action directed by the Commission and shall render a report of such measures to the Director. The findings and decisions of the Commission shall be final and shall be subject only to administrative review as provided in ARS12-901 through 914.